The Episcopal Community of St. Petersburg, d/b/a Suncoast Manor *and* United Food and Commercial Workers Local 1776, Professional and Health Care Division International Union, AFL-CIO-CLC. Case 12-CA-9764

August 20, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 30, 1981, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled proceeding, in which it granted the General Counsel's Motion for Summary Judgment and found that The Episcopal Community of St. Petersburg, d/b/a Suncoast Manor, herein called Respondent, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to bargain collectively with United Food and Commercial Workers Local 1776, Professional and Health Care Division, United Food and Commercial Workers International Union, AFL-CIO-CLC, herein called the Union, following a Board election in Case 12-RC-6062 and the Union's certification as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate. On May 24, 1982, the Board notified the parties that it had decided *sua sponte* to reconsider its Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having reviewed the record in this proceeding, we hereby reaffirm our previous Decision except that we find that the Employer's argument that the exclusion of certain dietary department employees from the unit constituted an undue proliferation of health care bargaining units was not raised in the underlying representation case and therefore is not properly before the Board in this proceeding.

This case involves Respondent's test of the Board's certification of the Union as the exclusive bargaining representative of a unit of service and maintenance employees. In the underlying representation proceeding Respondent argued that it was a joint employer with ARA Services of the dietary employees and therefore those employees should be included in the petitioned-for unit. The Regional Director for Region 12 found that Respondent and ARA Services were not joint employers and subsequently excluded the dietary staff from the unit found appropriate. Thereafter Respondent filed a request for review of the Regional Director's decision. The Board in denying the request for review found it unnecessary to reach the joint-employer issue on grounds that even if Respondent and ARA Services were joint employers it was not necessary to include the employees of the joint employer, ARA Services, since they had a different employer (than solely Respondent) and would constitute a separate appropriate unit. Subsequently, Respondent refused to bargain with the Union and the General Counsel moved for summary judgment on the complaint alleging that Respondent's refusal to bargain constituted a violation of Section 8(a)(5) and (1) of the Act.

In its answer to the Motion for Summary Judgment, Respondent affirmatively argued that "exclusion of dietary employees . . . constitutes an undue proliferation of health care bargaining units . . . ." The Board in granting the General Counsel's Motion for Summary Judgment concluded that Respondent raised this argument in the underlying representation proceeding and that Respondent was therefore precluded from relitigating the issue in the instant proceeding. Upon reexamination of the record, we find that, while Respondent made a passing reference to the health care issue in the underlying representation case, it did not argue the point to the Board.

Respondent initally moved to dismiss the petition on the ground that directing an election in the petitioned-for unit would result in an "unnecessary fragmentation of the Employer's workforce"; however, Respondent did not assert that it was a health care institution invoking the congressional admonition against the proliferation of units in the health care industry. Indeed, in its request for review, Respondent appears to concede that it is not a health care institution. Thus, in describing the health care facility which services Respondent's retirement community, Respondent states, "While health care is an integral part of the services provided by the Employer, it is not their primary mission nor the apex of this operation. . . . It would be impossible for Suncoast to provide nursing home care of their entire membership. There was never any discussion or intent that Suncoast become a nursing home."

In these circumstances, we find that Respondent's brief reference to fragmentation of its work force and to units in the nursing home/health care industry does not constitute an argument that it is a health care institution or that the unit found appropriate results in an undue proliferation of health care bargaining units. As these arguments could have been, but were not, raised in the underlying representation case, we find that Respondent is not

[1] 258 NLRB 1279.

entitled to litigate these matters in this unfair labor practice proceeding.

On the basis of the foregoing, we hereby affirm our original findings, conclusions of law, and Order except as modified above.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms the original Decision and Order in this proceeding, except as modified, and orders that the Respondent, The Episcopal Community of St. Petersburg, d/b/a Suncoast Manor, St. Petersburg, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Board's original Order (258 NLRB 1279).